Supreme Court, U.S.
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NO. 92-1447

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN RE NORMAN A. MOSCOWITZ,
Petitioner,
v.

GILBERT S. MERRITT,
CHIEF JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAMON J. KEITH,
CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND

PIERCE LIVELY,
SENIOR CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT,
Respondents.

BRIEF IN OPPOSITION TO NORMAN A. MOSCOWITZ'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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Statement of the Case

John Demjanjuk was extradited to Israel on February 27, 1987. He was convicted there in 1988 for crimes committed by "Ivan the Terrible", the ruthless Nazi guard of the Treblinka gas chambers during World War II. The Israeli Court sentenced Mr. Demjanjuk to death; he is currently in Israel in solitary confinement under 24-hour surveillance awaiting a final determination by the Israeli Supreme Court.

In 1985, the United States Court of Appeals for the Sixth Circuit had upheld the extradition of Mr. Demjanjuk by declining to issue a writ of habeas corpus to stop the process. 776 F.2d 571 (6th Cir. 1985). On June 5, 1992, the Sixth Circuit, sua sponte, issued an order beginning an inquiry to determine whether Demjanjuk's extradition may have been based on erroneous information. The June 5 order asked, inter alia, for a brief from the United States describing all information in the government's possession tending to show Demjanjuk was not "Ivan the Terrible." A second order issued on June 18 asked the parties to brief relevant international law issues, "in light of possible new evidence that Demjanjuk is not 'Ivan the Terrible'."

On August 17, after briefing and oral argument pursuant to the orders of June 5 and June 18, the Sixth Circuit panel issued a third order. The order of August 17 recounted the motivation for the court's reopening of the case:

> [T]he court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as "Ivan the Terrible" who

> operated the gas chambers at the Treblinka, Poland death camp. The "bedrock question" for the court ... is whether the failure of the attorneys to disclose such exculpatory information constituted fraud upon the court that mislead this court into allowing Demjanjuk to be extradited.

In order to procure information the Sixth Circuit panel deemed "essential" for reaching a decision on the issue of fraud, the court appointed Judge Thomas Wiseman of the Middle District of Tennessee as Special Master to conduct hearings and report back to the Sixth Circuit.

As the Sixth Circuit's Order required, Petitioner Norman Moscowitz was called as a witness in the Special Master proceedings; he took the stand before Judge Wiseman January 14-15, 1993. His testimony is a matter of public record. Petitioner Moscowitz was one of the lead attorneys during the initial Demjanjuk denaturalization investigation at the Justice Department's Office of Special Investigations (OSI)--the Nazi hunting office of the Department.

Having testified before the Special Master, petitioner Moscowitz now asks this Court for a writ of mandamus or prohibition to stop the hearings ordered by the Sixth Circuit.

Summary of Argument

Norman Moscowitz lacks the standing necessary to petition this Court for an extraordinary writ. A basic requirement of standing is that the party claiming standing must be aggrieved by a prospective judgment. Petitioner Moscowitz is--by his own admission--not a party to this dispute; he is a nonparty witness. A judgment against the government will have no adverse legal

impact for Petitioner Moscowitz. It is only in the most unusual circumstances that a nonparty witness may make procedural challenges to a proceeding. Having declined to suffer a contempt citation in order to challenge the jurisdiction of the Special Master, Moscowitz now lacks standing to challenge the Sixth Circuit's procedures.

The use of the extraordinary writ of mandamus would be inappropriate in this case. Mandamus should not issue where there is another adequate remedy available. If petitioner Moscowitz has the standing he claims (but which respondent does not concede) then the avenue of appeal is available after an adverse judgement by the Sixth Circuit. Moreover, mandamus may not be used to challenge a Court's actions in the exercise of its proper jurisdiction. Only when a court has refused to act, or has acted completely outside of its jurisdiction may a superior court issue a writ of mandamus. In this instance, the Sixth Circuit has acted. An investigation of fraud on the court is clearly within the Sixth Circuit's jurisdiction. Thus, mandamus is inappropriate. The writ may not be used to dictate the manner of a judge's action. The case of La Buy v. Howes Leather Co., 352 U.S. 249 (1957) is inapposite. The inquiry by the Special Master in this instance is justified by exceptional circumstances, is conducted by a sitting federal judge and is not a trial. These facts distinguish the current case from La Buy.

This case is moot with regard to petitioner Moscowitz. Petitioner Moscowitz has testified under oath in open court. Moscowitz asserts that he may suffer reputational injury from a

finding by the Sixth Circuit, based in part on his testimony. Having testified, Moscowitz may not now complain of the process by which his testimony was procured. Speculative reputational harm or professional injury are not adequate to make ripe for decision an otherwise moot case.

Finally, the equities of this case militate against the issuance of an extraordinary writ to stop the Special Master proceeding. Mandamus is governed by equitable principles. The Sixth Circuit is attempting to determine whether Justice Department attorneys conducted a fraud on the court in order to procure the extradition of John Demjanjuk. One of the attorneys testifying to the events of that extradition now asks that the hearing be suspended and delayed to protect his reputation, while the subject of the extradition itself remains under a death penalty in Israel. Mandamus should be withheld where the equities do not favor the issuance of the writ.

Argument

I. Petitioner Moscowitz lacks standing to challenge the jurisdiction and procedures of the Sixth Circuit in its investigation of fraud on the court.

Norman Moscowitz has petitioned the Court for a writ of prohibition or mandamus to halt the Sixth Circuit's Special Master proceeding alleging that he has a "personal stake" in a finding of prosecutorial misconduct. Petition at 3. By his own admission, Moscowitz is not a party to the ongoing dispute between John Demjanjuk and the United States Government. Petition at 2. His only role is as a witness called to testify

about the procedures in the Office of Special Investigations and his own actions during the denaturalization proceedings against John Demjanjuk over a decade ago. As a nonparty witness, who does not meet the essential standing requirements of particularized injury, causation and redressability, Moscowitz has no standing to challenge the Sixth Circuit's proceedings.

a. Petitioner lacks the basic requirements of standing.

At an irreducible minimum, Article III requires that the party who invokes the court's authority show that he personally has suffered a particularized actual or threatened injury as the result of the putatively illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. Bender v. Williamsport Area School Dist., 475 U.S. 534, 542 (1986); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). Petitioner cannot show that the conduct of the Sixth Circuit threatens him with an injury adequate to confer standing. Petitioner's claimed injury is speculative, unrelated to the challenged action, and would not be redressed by a favorable decision.

Petitioner's claimed injury is too speculative to support standing. At core, Petitioner claims that the Sixth Circuit's investigation would harm his reputation and possibly lead other bodies to institute disciplinary sanctions against him. Petition at 5. While in some circumstances a stigmatizing injury might be sufficient to support standing, Wright v. Allen, 104 S.Ct. 3315, 3328 n.22 (1984), because Petitioner presents nothing beyond a

bare assertion to support his claim of reputational injury, Petitioner's claim of injury is insufficient. Block v. Meese, 793 F.2d 1303, 1308 (D.C. Cir.), cert. denied 478 U.S. 1021 (1986). Similarly, Petitioner's concern about future disciplinary proceedings is too speculative to confer standing, because he makes no showing that such proceedings will likely be initiated. Moreover, had such a showing been made, Petitioner's rights would be adequately protected in any state disciplinary proceeding against him. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).[1]

In addition, Petitioner's claimed injury cannot be traced to the Sixth Circuit's fraud on the court investigation. The crux of the dispute in this case is whether judicial approval under 18 U.S.C. § 3184 for Mr. Demjanjuk's extradition to Israel was improperly procured by the Justice Department. The Sixth Circuit's order appointing the Special Master explicitly indicates that the "bedrock question" before the Sixth Circuit "is whether the failure of the [Department of Justice] attorneys to disclose...exculpatory information constituted fraud upon the court that misled this court into allowing Demjanjuk to be extradited." Order of Aug. 17, at 3. The purpose of the Sixth Circuit inquiry, and the focus of the fact finding delegated to the Special Master, is to discern whether there was fraud on the court necessitating vacatur of Demjanjuk's extradition. Id.; see also Chambers v. NASCO, 111 S.Ct. 2123, 2132 (1991). Thus,

[1] To see the extent of the protections that the Sixth Circuit has erected in its disciplinary proceedings, see Petition at 21 n.12.

contrary to Petitioner's assertion, the purpose of the investigation is not to sanction or to impugn the particular government attorneys who worked on or supervised the Demjanjuk denaturalization, deportation, and extradition proceedings. This Court should not confer standing for appeal on the losing counsel in every action where a court dismissed or vacated a judgment, regardless of its ancillary effect on an attorney's reputation.

Finally, Petitioner's claimed injury would not be redressed by a decision in his favor. Petitioner criticizes the procedures by which the Sixth Circuit is conducting its investigation. Petition at 21. However, following Petitioner's suggestion--that "the matter be[] properly remanded to the district court,"--would nonetheless require Petitioner to testify as to his conduct, the very requirement in which Petitioner finds his injury.

b. Petitioner is not a de facto party.

Petitioner wisely concedes that, in general, "one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." Karcher v. May, 484 U.S. 72, 77 (1987). Petitioner nonetheless suggests that he is a de facto party. This Court should reject Petitioner's suggestion.

The doctrine of de facto parties allows appeals to persons who were required to participate in trial court proceedings much as if they had intervened. See, e.g., Martin-Trigona v. Shiff, 702 F.2d 380, 385 (2d Cir. 1983); see also 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3902.1 (1992). Petitioner would stretch this doctrine beyond usefulness. His assertions that he has been ordered "to

participate in the proceedings" and that he was "specifically named" in the Sixth Circuit's order appointing a Special Master, Petition at 4, do not bring him into the fold of the de facto party doctrine, but rather confirm his status as a witness. The Sixth Circuit listed Petitioner's name among the four lawyers whose involvement in Mr. Demjanjuk's proceedings would make them particularly knowledgeable witnesses. Petition at A-7. The "participation" that the Sixth Circuit ordered of Petitioner was not as a party but rather as a witness.

By contrast, the de facto parties recognized in Martin-Trigona, which the Petitioner cites as authority for his own status, participated in the underlying proceedings much as parties. Martin-Trigona involved trustees of a bankruptcy estate who sought to appeal a habeas corpus judgment that released the bankrupt from civil contempt ordered when the bankrupt refused to answer questions relating to the estate. In that case, "[a]lthough the trustees were not named parties in the district court, they did participate in those proceedings. In fact, the district court ordered both trustees, 'being the real parities [sic] in interest,' to respond to [the petitioner's] application for...relief." Id. at 385. In light of their involvement, the court allowed them to bring their appeal of the habeas action. Petitioner's involvement in this case as a witness is not commensurately significant nor insisted upon.

Finally, one cannot use the de facto party doctrine to circumvent the constitutional requirement of standing. In the absence of standing, Petitioner cannot cling to his self-

perceived status as a de facto party to allow him to bring this appeal.

c. A nonparty witness has limited rights of appeal.

Witnesses are essential to the fair and full adjudication of legal issues. "Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law. Lord Chancellor Hardwicke's pithy phrase cannot be too often recalled: '[T]he public has a right to every man's evidence.'" Piemonte v. United States, 367 U.S. 558, 559 n.2 (1961); see also United States v. Sciarra, 851 F.2d 621, 636 (3d Cir. 1988) (observing that the nonparty witnesses in the case before it "have done nothing more than their public duty, inconvenient as it may have been, to provide unprivileged information requested by their government."). Petitioner Moscowitz is a witness in the Sixth Circuit's investigation of fraud on the court, and was so designated by the Court's order of August 17, 1992, appointing a Special Master to conduct hearings.

A finding that Petitioner Moscowitz has standing to make a procedural challenge in a court proceeding in which his only role is as a nonparty witness would set a remarkable precedent. This Court has in the past severely constrained the rights of nonparty witnesses to challenge court proceedings. A nonparty witness is not permitted to make objections of incompetency or irrelevancy, "for this is no concern of his." Blair v. United States, 250 U.S. 273, 282 (1919). "[I]t is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not." Id. The Court has limited

nonparty witnesses' rights to a jurisdictional challenge via the appeal of a contempt citation for refusal to testify. United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72 (1988). Except in the unique circumstance of a contempt citation, a nonparty witness may not obtain appellate review of a court's order requiring testimony or production of documents. See United States v. Ryan, 402 U.S. 530, 532 (1971)("If... the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him."). In Alexander v. United States, 201 U.S. 117 (1906), the Circuit Court for the Eastern District of Wisconsin had issued orders that a number of witnesses appear before a "special examiner" to answer questions and produce requested documents. The subpoenaed witnesses appeared but refused to answer certain questions or permit the use of certain papers "on the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced." The Circuit Court ordered the witnesses to answer the questions and the nonparties appealed to this Court. This Court held that the only means of review for the nonparty witness was to refuse to testify and then challenge the contempt order:

> [A]n order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as orders under review, but from such a ruling it is not contended there is an appeal. Let the court go further, and punish the witness for contempt of its order, --then arrives the right of review...."

Id. at 121. Petitioner Moscowitz could have challenged the jurisdiction of the Sixth Circuit by refusing to testify and by

being held in contempt. To his credit, in a deliberate tactical decision, Moscowitz did not choose that route. But appeal through contempt remains the only method by which a nonparty witness may challenge the order of a court. Having chosen to testify, Petitioner now lacks standing to ask this Court to issue a writ of mandamus.

II. With regard to Petitioner Moscowitz, this case is moot.

Petitioner Moscowitz alleges that the findings of Special Master Wiseman will "not only cause irreparable harm to his reputation, but could also lead to further disciplinary proceedings against him." Petition at 5. But Mr. Moscowitz has already testified under oath before the Special Master. This testimony was covered in the national press.[2]

Because Mr. Moscowitz has testified and all of the evidence surrounding his involvement with the Demjanjuk case is now a matter of public record on file with the Special Master in Nashville, the petition is moot. "Mootness determinations are concerned in large part with the determination whether any effective purpose can still be served by a specific remedy." 13A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §3533.1 (1984). Had Moscowitz chosen to resist the subpoena compelling him to testify, his complaints about the procedures used by the Sixth Circuit would be ripe. But having

[2] See, e.g., "Ivan" Inquiry Defended, Sun Sentinel (Florida), Jan. 16, 1993, at 3A; Matthew Brelis, Ex-U.S. Official Defends Demjanjuk Prosecution, Boston Globe, Jan. 30, 1993, at 15; Former Nazi Hunter Says "Ivan" is Guilty, San Jose Mercury News, Jan. 15, 1993, at 4A; Paul Levitt, Ivan Hearing, USA Today, Jan. 15, 1993, at 11A; Ex-Nazi Hunter Defends "Ivan" Investigation, Wash. Times, Jan. 16, 1993, at A2.

testified, Moscowitz cannot now complain about the process by which his testimony was procured.

In Office of Thrift Supervision v. Dobbs, 931 F.2d 956 (D.C.Cir. 1991), the OTS had issued a subpoena duces tecum requiring the production of certain documents and an appearance at a deposition. Citing numerous decisions of other courts, the D.C. Circuit dismissed an appeal challenging the subpoena on the ground that Dobbs had already complied and OTS had obtained his testimony. See id. at 957 and cases cited therein. As to Dobbs's complaint that he remained subject to the subpoena and could be called to testify again, the court found that "future speculative action that may never occur is insufficient to create a concrete present controversy." Id. at 958; see also, United States v. Kis, 658 F.2d 526, 532-33 (7th Cir. 1981), cert. denied sub. nom. Salkin v. U.S., 455 U.S. 1018 (1982)(appeal to prevent future use of compelled evidence dismissed as moot because such use would be highly speculative). Injuries that are too speculative do not merit extraordinary relief. Whitehorse v. Ill. Central R. Co., 349 U.S. 366, 373 (1955).

Moscowitz's complaints about the potential for future injury in his professional life on the basis of theoretical disciplinary action by a hypothetical body are also moot, because any such action is highly speculative. Moreover, the testimony on which such an action would be based is part of the public record of

this case. There is no live controversy regarding petitioner Moscowitz and the writ of mandamus should be denied.[3]

III. It would be an improper use of the extraordinary writ of mandamus for this Court to stay the Sixth Circuit's investigation of fraud on the court.

a. If Petitioner has standing to obtain an extraordinary writ, then he also has standing to appeal from an adverse finding, and therefore there exists an adequate remedy at law.

Petitioner Moscowitz may not obtain review of the Sixth Circuit's investigation of fraud on the Court via a mandamus petition.[4] Mandamus is appropriate when appeal is clearly inadequate and the writ is reserved for truly extraordinary causes. These prohibitions are particularly relevant where mandamus is requested against a judge. Ex Parte Fahey, 332 U.S. 258, 259-60 (1947). Petitioner Moscowitz claims that he has no other adequate remedy available to challenge the appointment of the Special Master, bemoaning the United States' reluctance to take immediate action. Petition at 6.[5] But if Petitioner Moscowitz has standing to obtain a writ of mandamus, as he claims, Petition at 2-6, then he would also have standing to

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[3] An apparent acceptable remedy to Mr. Moscowitz -- remand to the district court judge who heard the denaturalization and extradition cases -- would not avoid the type of public inquiry that is now taking place before the Special Master and from which Mr. Moscowitz requests relief.

[4] Petitioner styles his motion a "Petition for a Writ of of Prohibition or Mandamus." The following arguments, although directed toward the writ of mandamus, apply equally to the writ of prohibition. See Robert L. Stern & Eugene Gessman, Supreme Court Practice § 11.2, at 630 (5th ed. 1978) ("[S]ince almost any issue can be phrased either affirmatively or negatively, these writs are often used interchangeably....").

[5] "[T]he Department [of Justice] has elected not to pursue [jurisdiction] objections until after judgment." Petition at 6.

obtain review through appeal after the final determination by the Sixth Circuit.[6]

While Mr. Demjanjuk does not concede that Petitioner Moscowitz has standing to challenge actions by the Sixth Circuit (see Part I, supra), taken on its own terms Petitioner's argument is internally inconsistent. In order to establish the standing necessary to obtain an extraordinary writ, Moscowitz makes reference to cases granting nonparties the right to appeal. If petitioner Moscowitz does have the nonparty standing he claims, then like the government, he may assail the procedures used by the Sixth Circuit after a final decision.

No writ may be granted where there is an adequate remedy through the appellate process. See Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296, 309 (1989) ("[P]etitioners must show that they lack alternative means to obtain the relief they seek, and carry the burden of showing that their right to issuance of the writ is clear and indisputable.") (citations omitted); Will v. United States, 389 U.S. 90, 96 (1967)(mandamus may never be employed as a substitute for appeal); Marbury v. Madison, 1 Cranch 137, 169 (1803)("Still, to render the mandamus a proper remedy ... the person applying for it must be without any other specific and legal remedy.") Because, if Petitioner Moscowitz has the standing he claims, he

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[6] If injured in a fashion adequate to support standing, Petitioner Parker would be able to intervene after final judgment and seek to appeal the Sixth Circuit's findings. See e.g., United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)(permitting post-judgment intervention by nonparty for purpose of appeal).

would also be able to appeal a final judgment, a mandamus action before final judgment is improper.

b. Petitioner alleges no actions by the Sixth Circuit that justify the issuance of an extraordinary writ of mandamus

Beyond the fact that Petitioner Moscowitz--if he has any standing at all--must wait for a proper appeal, the principles of mandamus do not permit the issuance of a writ under the facts alleged in the petition. The Sixth Circuit has not declined to exercise its jurisdiction; nor does Moscowitz allege that the Court has exceeded its jurisdiction in appointing a Special Master. Rather, petitioner Moscowitz complains in part of a decision made by the Sixth Circuit in the exercise of its jurisdiction. See Petition at 13-16 (arguing that the Sixth Circuit should have remanded the case to the district court as a fact-finder in the fraud on the court investigation); id. at 16-19 (arguing against the procedures adopted by the Sixth Circuit in hearing the fraud on the court case). Petitioner also argues that the Sixth Circuit is without jurisdiction. This claim is too frivolous to justify mandamus.

A writ of mandamus may not be used to challenge a court's actions in the exercise of its proper jurisdiction. An inferior court may only be ordered through mandamus that it must exercise its jurisdiction, or be instructed that it has engaged in a usurpation of power. Mandamus may not be used to order a lower court to re-evaluate an abuse of discretion. Will v. United States, 389 U.S. 90, 104 (1967); See Roche v. Evaporated Milk

Ass'n, 319 U.S. 21, 27 (1943)(refusing to issue writ where an inferior court "acted within its jurisdiction" even though the action taken may have been erroneous); Interstate Commerce Commission v. U.S. ex rel Campbell, 289 U.S. 385, 394 (1933)("If mandamus were to stand...the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is the appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action."); Ex Parte Perry, 102 U.S. 183, 186 (1880)("We cannot by mandamus correct the judicial errors committed by an inferior court in the progress of a cause. We can in this way, in a proper case, compel an inferior court to act, but cannot control its decisions while acting."); Ex Parte Sawyer, 88 U.S. 235, 238 (1874)("A superior court may by mandamus set the machinery of an inferior court in motion, but when that has been done, its power under that form of proceeding is at an end. The inferior court is supreme within its own jurisdiction, so long as it is acting."); Ex Parte Newman, 81 U.S. 152, 165 (1871)("[T]he only office of the writ [of mandamus] when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.").

There is no valid argument that the Sixth Circuit's appointment of a Special Master constituted the "usurpation of power" necessary to justify mandamus. See Gulfstream Aerospace v. Mayacamas Corp., 485 U.S. 271, 289 (1988). To the extent that Petitioner Moscowitz complains only that the Sixth Circuit decided to engage in fact-finding by delegating the task of taking evidence during an inquiry into fraud on the court to one federal judge rather than another, writ of mandamus is an inappropriate vehicle for relief. On the other hand, to the extent that Petitioner Moscowitz complains that the Sixth Circuit has acted beyond its jurisdiction, Petition at 10-13, the Petitioner is clearly in error.

The the Sixth Circuit's appointment of a Special Master is a wholly proper exercise of discretion, unreviewable by mandamus. Petitioner Moscowitz relies on La Buy v. Howes Leather Co., 352 U.S. 249 (1957), a case where this Court affirmed the issuance of a writ of mandamus ordering a district judge to vacate a reference order to a non-judge special master under F.R.C.P. 53. La Buy was a hotly debated 5-4 opinion which is distinguishable on its facts and by subsequent decisions of the Court. In La Buy, the district judge had referred entire civil antitrust trials to a master on the basis that the district judge feared full trial proceedings would take too long, clogging his busy docket. In affirming the Circuit Court's mandamus order, this Court was concerned that the litigants had been denied their right to a trial by an article III judge for no "exceptional"

reason. La Buy, 325 U.S. at 258.[7] The Circuit court that had issued the mandamus order was aware of the district judge's propensity to abuse the special master process.

That there was no intent in the La Buy decision to permit interlocutory review via mandamus of all discretionary applications of the federal rules was subsequently made clear in Will v. United States, 389 U.S. 90, 96 (1967). In Will, this Court described La Buy as a case where the judge had displayed "a persistent disregard for the federal rules." Will, 389 U.S. at 104 n.14. Finding no pattern of "deliberate disregard for the federal rules" in the record in Will, the Court declined to issue the requested writ:

> In La Buy, however, we specifically relied upon evidence in the record which showed a pattern of improper references of cases to special masters by the District Judge. There is no evidence in this record concerning petitioner's practice in other cases, aside from his own remark that the government is generally dissatisfied with it, and his statements do not reveal any intent to evade or disregard the rules.

Id. at 104-05. No such allegation has been made in Moscowitz's petition. While the instant case involves the same rule

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[7] Apparently the reference of cases to non-judge lawyers was of particular concern to the La Buy majority as it cited in a footnote a passage from a then current casebook on Judicial Administration:

> There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as a referee. Only a drastic administrative rule...will put to rout this inveterate enemy of dispatch in the trial of cases.

La Buy, 352 U.S. at 253 n.5 (citation omitted).

(F.R.C.P. 53) as La Buy, Moscowitz's petition is best analogized to the situation found in Will:

> Thus, the most that can be claimed on this record is that petitioner may have erred in ruling on matters within his discretion. See Parr v. United States, 351 U.S. 513, 520 (1956). But "[t]he extraordinary writs do not reach such cases; they may not be used to thwart the congressional policy against piecemeal appeals." Id., at 520-521. Mandamus, it must be remembered, does not run the gauntlet of reversible errors." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953). Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power. Id. at 383. Thus, the record before us simply fails to demonstrate the necessity for the drastic remedy employed.

Will, 389 U.S. at 103-04 (parallel citations omitted).

Beyond the lack of a "pattern of disregard" for the rules, other facts distinguish La Buy from the instant case. La Buy involved the reference of an entire trial to a master. The master in La Buy was not an article III Judge. Other courts have agreed that a reference of an entire trial, or reference to a non-judge master is a clear abuse of discretion, to be cured through mandamus under La Buy. See e.g., In re Bituminous Coal Operators' Ass'n, inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991)(special master may not be appointed as a "surrogate judge" to try the controversy and determine liability); In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985)(district court erred in granting the master authority to preside at trial on the merits but reference for other purposes held proper); In re Watkins, 271 F.2d 771, 775 (5th Cir. 1959)(mandamus appropriate where reference to master "nullifies the right to an effective trial

before a constitutional court"). Thus, to the extent that mandamus is used to guarantee a party the right to trial before a constitutionally appropriate fact-finder, La Buy is in keeping with Supreme Court precedent. See Thermatron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)(mandamus appropriate to correct a clearly erroneous remand of case out of a federal forum); Dairy Queen v. Wood, 369 U.S. 469, 472 (1962)(mandamus appropriate to protect constitutional right to trial by jury); Beacon Theatres, Inc v. Westover, 359 U.S. 500 (1959)(same). The Sixth Circuit referred the fact-finding duties in this case to a sitting federal Judge--Judge Wiseman of the Middle District of Tennessee. Judge Wiseman is anything but the "temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work" that the supreme Court had warned against as a fact-finder in La Buy. La Buy, 325 U.S. at 259. Moreover, the investigation taking place in Nashville is not a trial. It is an inquiry into prosecutorial misconduct during proceedings long past. Therefore, La Buy is inapplicable on its facts.

Moreover, to the extent that La Buy was a decision generally granting superior courts "supervisory control" over inferior courts though the use of mandamus, it is dubious precedent. In this regard, "La Buy is defunct. Although the Court has not yet erected the tombstone, it has ordered flowers." First National Bank of Waukesha v. Warren, 796 F.2d 999 (7th Cir. 1986)(opinion of J. Easterbrook). See also, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 n.7 (1978)("Although in at least one instance we

approved the issuance of the writ upon a mere showing of an abuse of discretion, La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957), we warned soon thereafter against the dangers of such a practice.")(plurality opinion)(citing Will v. United States). Because the Sixth Circuit's action does not fit the requirements for a writ of mandamus under La Buy, and because the Sixth Circuit was exercising its sound discretion by appointing one federal judge rather than another to investigate fraud on the Sixth Circuit court, no writ of mandamus should issue in this case.

Finally, to the extent that Petitioner Moscowitz complains that the Sixth Circuit has acted beyond its jurisdiction, Petition at 10-13, the Petitioner is clearly in error. It is beyond dispute that the Sixth Circuit has the authority to inquire into the issue of fraud on the Court. Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991); Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). Petitioner labors the question of Mr. Demjanjuk's possible stake in this proceeding, but ignores that the question before the Sixth Circuit is simply whether it was defrauded. Public faith in the judiciary is reaffirmed by assiduous analysis of possible fraud on the court.

IV. The equities of this case favor a speedy resolution of this dispute and militate against the issuance of an extraordinary writ of mandamus.

While mandamus is available only in an action at law, it is governed by equitable principles. Stern v. South Cester Tube Co., 390 U.S. 606, 609 (1968). "[Mandamus] may be refused for reasons comparable to those which would lead a court in equity, in the

exercise of its sound discretion, to withhold its protection of an undoubted legal right." United States v. Dern, 289 U.S. 352, 359 (1933). See also In re First Federal Sav. and Loan Ass'n of Durham, 860 F.2d 135, 140 (4th Cir. 1988)(court should not overlook principles of fairness when they are enmeshed in mandamus considerations); DeGaston v. Dillon, 247 F.Supp. 511 (1963) affirmed sub. nom Degaster v. Fowler, 354 F.2d 515 (D.C. Cir. 1955)(mandamus denied because plaintiff came into court with unclean hands).

Petitioner Moscowitz claims that the Sixth Circuit's investigation would harm his reputation and possibly lead other bodies to institute disciplinary sanctions against him. Petition at 5. By contrast, Mr. Demjanjuk is currently in Israel locked in solitary confinement under a death sentence. It is ludicrous for a former employee of the United States government to claim that the potential for reputational injury merits further delay so that the Sixth Circuit may reconsider its procedures while John Demjanjuk's life quite literally may hang in the balance. A speedy determination by the Sixth Circuit could have great significance, legal and diplomatic, to the proceedings in that country.

Beyond the reality of Mr. Demjanjuk's incarceration in solitary confinement under 24-hour surveillance is a simple yet powerful principle: justice delayed is justice denied. For the past fifteen years John Demjanjuk and his family have lived under the accusation that Demjanjuk was "Ivan the Terrible"--one of the most sadistic and ruthless mass-murderers in human history. This

was the offense for which Mr. Demjanjuk was extradited and for which the Rule of Specialty allowed him to be tried, convicted and sentenced to death in Israel. In a similar vein, public dissatisfaction with the fairness and propriety of its courts and government litigators must be resolved in a timely fashion.

A court should not act on a request for mandamus where the equities do not favor issuance of the writ. Petitioner Moscowitz claims to be fearful that a federal court will determine that he or his colleagues acted fraudulently in proceedings that led to extraditing John Demjanjuk for crimes the evidence now shows another person committed.[8] Moscowitz petitions the Court to issue a writ of mandamus stopping further investigation by a federal court into petitioner's own conduct. Issuance of mandamus in such a circumstance runs counter to all principles of equity. The court should exercise its sound discretion and withhold the requested writ.

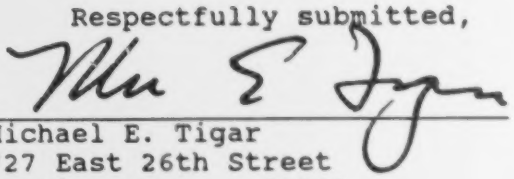
Conclusion

For the foregoing reasons, this Court should deny Norman Moscowitz's petition for a writ of prohibition or mandamus.

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[8]In his own testimony, however, Petitioner seemed to deny that he partook in any wrongdoing. Were this believed, Petitioner's testimony would present, obviously, no danger to his reputation at all.

Respectfully submitted,



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